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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

11 NORTH COAST ENTERPRISES, a
12 Washington corporation,

13 Plaintiff,

14 v.

15 ST. PAUL FIRE & MARINE INSURANCE
COMPANY, a Minnesota corporation,

16 Defendant.
17

No. C05-653L

ORDER ON MOTION FOR PARTIAL
SUMMARY JUDGMENT
REGARDING THE SUIT
LIMITATION CLAUSE

18 **I. Introduction**

19 This matter comes before the Court on “Plaintiff’s Motion for Partial Summary Judgment
20 Re: Scope of Coverage” (Dkt. # 14). St. Paul Fire & Insurance Company (“St. Paul”) issued a
21 first-party, builder’s risk insurance policy covering the Library Square and Hawthorne
22 Apartment projects. North Coast Enterprises (“North Coast”) served as general contractor for
23 both of these projects and was the loss payee for the policy. North Coast now moves for
24 summary judgment on St. Paul’s affirmative defense that North Coast’s suit is barred by the
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CLAUSE

1 policy's two-year suit limitation clause. Answer at 4, ¶ 7 (affirmative defenses).

2 **II. Background**

3 St. Paul's builder's risk policy covered loss at the Library Square and Hawthorne
4 Apartment projects from December 29, 2000 to December 29, 2002. The parties dispute the
5 precise date, but at some point between late August, 2002 and early November, 2002, the
6 Library Square building suffered water damage that was caused, in part, by inadequate flashing
7 between the deck units and the building's exterior. The source of the water was either a flood
8 test or an unusually inclement storm.

9 North Coast submitted a claim for loss to St. Paul on December 2, 2003. St. Paul first
10 responded to this claim on January 12, 2004. In this response, St. Paul indicated that it had not
11 yet made a determination on the outcome of the claim, and requested more information from
12 North Coast. North Coast responded on January 26, 2004, including with its letter the
13 supporting documentation that St. Paul had requested.

14 St. Paul next contacted North Coast on April 2, 2004, again requesting more information.
15 That e-mail asked for unexcerpted versions of certain construction reports, contracts, and other
16 documents. North Coast provided some of this documentation shortly thereafter. On April 7,
17 2004, representatives for the parties met to discuss the matter. That meeting was followed the
18 next day by a letter from St. Paul to North Coast, explaining that St. Paul needed further
19 information to understand the claim. North Coast responded with the requested information on
20 April 22, 2004.

21 The next communication in the record is a letter from North Coast, which was apparently
22 in response to a request from a telephone conversation for more information from St. Paul's
23 representative. Included with that letter was "supporting documentation for the amount claimed
24 on the Library Square Project, both hard and soft costs," as well as North Coast's "Sworn Proof
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1 of Loss.” Harper Decl. Ex. I. This letter is dated May 26, 2004. On June 10, 2004, St. Paul
2 responded to acknowledge receipt of the information and also said: “Please be advised that we
3 will need more time to assess these claims.” Harper Decl. Ex. J.

4 Representatives from North Coast and St. Paul later exchanged informal contacts. On
5 July 2, 2004, Joseph Hampton, counsel for St. Paul, sent an e-mail to acknowledge receipt of a
6 voicemail from Greg Harper, counsel for North Coast, and indicated that review of the claim
7 was ongoing. Harper Decl. Ex. K (“We are still reviewing the updated claim and dox [sic] you
8 sent, and are in the process of formulating a response.”). Hampton followed up with a formal
9 letter communicating the same message on July 6, 2004. On August 5, 2004, a St. Paul
10 representative sent a substantially similar message to North Coast: “Please be advised that we
11 have nearly completed evaluating your client’s claims St. Paul’s coverage position on these
12 matters should be forthcoming shortly.” Harper Decl. Ex. M.

13 Hampton sent another letter to Harper on August 25, 2005. This letter stated that St. Paul
14 would “need more information to complete the coverage assessment.” Harper Decl. Ex. N. This
15 letter, sent almost nine months after North Coast’s initial claim, was by far the most specific. It
16 requested significant amounts of information and documentation on the claims, and the
17 construction and repair processes. This letter also requested that North Coast identify the
18 individuals involved with the building repairs, and requested that a representative of North Coast
19 appear at the offices of St. Paul’s legal counsel to provide testimony under oath. The
20 examination occurred on September 28, 2004. On October 21, 2004, St. Paul wrote to indicate
21 that it had just received the transcripts and “will, therefore, need an additional 30 days to
22 complete our assessment of North Coast’s claims.” Harper Decl. Ex. O.

23 On November 12, 2004, almost a year after the initial claim was filed, North Coast sent a
24 “settlement demand.” Response at 9. St. Paul responded by saying that it would forward the
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1 request to its client and indicated that it would be able to provide a response “within the next
2 thirty days.” Harper Decl. Ex. P.

3 Finally, on December 31, 2004, St. Paul wrote to decline coverage for North Coast’s
4 claim. Harper Decl. Ex. Q. The first section of the report identified the loss suffered at the
5 Library Square project as having been caused by failures in “planning, design, materials or
6 maintenance,” which were excluded under the policy. Harper Decl. Ex. A, p. 10. The second
7 section concluded that there had been no “direct physical loss or damage” to the Hawthorne
8 project. Harper Decl. Ex. Q, p. 22. The third and final substantive section observed that “North
9 Coast submitted its settlement demand proposal, but has not filed a lawsuit against St. Paul to
10 recover on its Library Square property claim. Pursuant to the suit limitation clause, even if
11 November 11, 2002 was the ‘date on which the direct physical loss or damage occurred,’ North
12 Coast would now be barred from bringing a law suit on its Library Square claim against St.
13 Paul.” Harper Decl. Ex. Q, p. 23.

14 North Coast filed suit on April 5, 2005. In its answer, St. Paul asserted an affirmative
15 defense that North Coast’s suit is barred by the suit limitation clause in the policy. North Coast
16 has moved for summary judgment on the defense based on equitable tolling of the limitation
17 period.

18 **III. Summary Judgment Standard**

19 As the summary judgment movant, North Coast must show that the “pleadings,
20 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
21 any, show that there is no genuine issue as to any material fact and that the moving party is
22 entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). According to this rule, “the
23 mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise
24 properly supported motion for summary judgment; the requirement is that there be no *genuine*
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1 issue of *material* fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). An
 2 issue is “genuine” if “a reasonable jury could return a verdict for the nonmoving party” and a
 3 fact is material if it “might affect the outcome of the suit under the governing law.” Id. at 248.

4 If North Coast satisfies this burden, St. Paul “may not rest upon mere allegations or
 5 denials of [North Coast’s] pleading, but . . . must set forth specific facts showing that there is a
 6 genuine issue for trial.” Fed. R. Civ. P. 56(e). “When the moving party has carried its burden
 7 under Rule 56(c), its opponent must do more than simply show that there is some metaphysical
 8 doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475
 9 U.S. 574, 586–87 (1986). This requires St. Paul “to go beyond the pleadings” to show the
 10 existence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324
 11 (1986).

12 North Coast argues in its motion that the policy’s suit limitation period should be
 13 equitably tolled. To succeed in this motion, North Coast must show that there exist no genuine
 14 issues of material fact as to the elements of equitable tolling. The parties agree that Washington
 15 law governs this action.

16 IV. Discussion

17 A. The Suit Limitation Clause

18 St. Paul’s builder’s risk policy includes a suit limitation clause in its general rules.
 19 Harper Decl. Ex. A at 8. The clause reads as follows: “**If your policy includes property**
 20 **insurance.** Any lawsuit to recover on a property claim must begin within 2 years after the date
 21 on which the direct physical loss or damage occurred.” In the instant suit, St. Paul claims that
 22 North Coast has made its loss date “a moving target.” Response at 3. Notwithstanding this
 23 assertion, it is clear that more than two years elapsed between the date that North Coast filed this
 24 suit (April 5, 2005) and the last day of the St. Paul policy (December 29, 2002). Thus, using
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1 any loss date, North Coast must overcome the suit limitation clause.

2 **B. Washington Equitable Estoppel Law**

3 North Coast does not dispute that contractual suit limitation periods in insurance policies
 4 are valid and enforceable under Washington law. See Rev. Code Wash. § 48.18.200 (“No
 5 insurance contract . . . shall contain any condition, stipulation, or agreement . . . limiting right of
 6 action against the insurer . . . to a period of less than one year from the date of the loss.”); see
 7 also Johnson v. Phoenix Assurance Co., 70 Wn.2d 726, 728–29 (1967) (upholding policy
 8 provision requiring suit “within twelve months next”). The Washington Supreme Court has
 9 “uniformly held that a clause in such a contract fixing a limitation of the time in which suit is
 10 sustainable is a valid one.” Hefner v. Great Am. Ins. Co., 126 Wash. 390, 391 (1923).

11 North Coast cites to California cases where courts have automatically tolled the suit
 12 limitation period when the insured submits its claim. See, e.g., Prudential-LMI Commercial Ins.
 13 v. Superior Court, 51 Cal.3d 674 (1990) (“We also hold that this limitation period should be
 14 equitably tolled from the time the insured files a timely notice, pursuant to policy notice
 15 provisions, to the time the insurer formally denies the claim in writing.”). Contrary to the rule in
 16 California, however, such equitable tolling is not automatic in Washington. See RCW
 17 48.18.470 (“None of the following acts by or on behalf of an insurer shall be deemed to
 18 constitute a waiver of any provision of a policy or of any defense of the insurer thereunder: . . .
 19 Investigating any loss or claim under any policy or engaging in negotiations looking toward a
 20 possible settlement of any such loss or claim.”). This statute protects insurers from the argument
 21 that a policy’s suit limitation clause is automatically tolled during an insurer’s investigation of a
 22 claim. Elliott Court Assocs. v. Affiliated FM Ins. Co., No. 99-0974 (W.D. Wash. December 14,
 23 1999) (Lasnik, J.) (order denying insurer’s motion for partial summary judgment) (“[T]he Court
 24 is precluded from equating defendant’s investigation, or promises thereof, with the voluntary
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1 relinquishment, or waiver, of the policy's suit limitation provision."). Washington courts have
 2 implicitly rejected automatic tolling. See Johnson v. Phoenix Assurance Co., 70 Wn.2d 726
 3 (1967) (not allowing claim when claimant sued just 21 days after the limitation period ended,
 4 and the investigation of the claim had taken more than 21 days).

5 Washington courts, however, have recognized tolling based on equitable estoppel.
 6 Dickson v. United States Fidelity & Guaranty, 77 Wn.2d 785, 788 (1970) ("The doctrine of
 7 equitable estoppel rests on the principle that where a person, by his acts or representations,
 8 causes another to change his position or to refrain from performing a necessary act to such
 9 person's detriment or prejudice, the person who performs such acts or makes such
 10 representations is precluded from asserting the conduct or forbearance of the other party to his
 11 own advantage."). The doctrine of equitable estoppel applies in the insurance context if there is
 12 "(1) [a]n admission, statement, or act inconsistent with the claim afterwards asserted; (2) action
 13 by the other party on the faith of such admission, statement, or act; and (3) injury to such other
 14 party from allowing the first party to contradict or repudiate such admission, statement, or act."
 15 Logan v. North-West Ins. Co., 45 Wn. App. 95, 100 (Wash. Ct. App. 1986).

16 **C. Communications Between North Coast and St. Paul**

17 North Coast fails to show that there is no genuine issue of fact as to the three material
 18 elements of an equitable estoppel claim. In its communications, St. Paul never told North Coast
 19 that coverage had been approved. In fact, St. Paul's communications simply complied with state
 20 insurance regulations in the Washington Administrative Code ("WAC") regarding claims
 21 handling. WAC 284-30-380(3) ("If the insurer needs more time to determine whether a first
 22 party claim should be accepted or denied, it shall so notify the first party claimant within fifteen
 23 working days after receipt of the proofs of loss giving reasons more time is needed."). While
 24 there is language in these letters to suggest that St. Paul sought to encourage North Coast to
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1 continue to engage in the claims process (and not file suit), the intent of the communications can
2 genuinely be disputed. Summary judgment is inappropriate based on this issue alone.

3 North Coast also fails to show that there is no genuine issue of fact as to whether it
4 justifiably relied on St. Paul's alleged efforts to keep the claims out of the courts until after the
5 suit limitation period expired. St. Paul disputes the adequacy of North Coast's naked assertion
6 that it would have filed suit but for St. Paul's assertions that it required more time to assess the
7 claim. Response at 14–16. St. Paul argues that North Coast should be able to produce some
8 evidence of its forbearance from suit in reliance on the communications, and suggests that
9 counsel for North Coast would have acted differently with regard to the negotiations if North
10 Coast had been aware of the suit limitation clause. Id. The Court is persuaded that a genuine
11 issue of fact exists here.

12 Finally, North Coast's motion fails because it cannot prove injury. The injury necessary
13 to satisfy this element will be the value of the claim if North Coast succeeds in this action. If St.
14 Paul asserts the suit limitation defense after North Coast is able to prove St. Paul's liability
15 under the contract, then North Coast will only have to show the first two elements of equitable
16 estoppel. It is premature at this stage, however, to strike the suit limitation period as an
17 affirmative defense.


18 North Coast finds helpful reasoning from several cases in which the trial court denied
19 summary judgment to the insurer based on equitable tolling. See, e.g., Rouse v. Glascam
20 Builders, 101 Wn.2d 127 (1984); Dickman v. Country Mut. Ins. Co., 120 Ill. App. 3d 470 (Ill.
21 App. Ct. 1983). These cases do not support the proposition, as North Coast suggests, that
22 insurers must be equitably estopped from asserting a suit limitation defense if the insured
23 submits its claim prior to the end of the suit limitation period. Rather, they simply show that
24 "estoppel claims implicate factual issues which are not appropriate for resolution on a motion for
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1 summary judgment.” Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F.Supp. 1400, 1419
2 (W.D. Wash. 1990). The Court finds this generalization appropriate here. The trier of fact must
3 assess whether St. Paul held inconsistent positions during the claims handling process and
4 whether North Coast acted in reliance on St. Paul’s alleged misrepresentations.

5 **V. Conclusion**

6 For the foregoing reasons, IT IS HEREBY ORDERED that North Coast’s motion for
7 summary judgment on St. Paul’s affirmative defense regarding the two-year suit limitation
8 clause (Dkt. # 15) is DENIED.

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10 DATED this 16th day of February, 2006

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13 Robert S. Lasnik
14 United States District Judge
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